**MAJLIS PERBANDARAN PETALING JAYA**

**v.**

**STRUKTURMAS (SELANGOR) SDN. BHD**

HIGH COURT MALAYA, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS J
[ORIGINATING SUMMONS NO. 35-7-92]
28 DECEMBER 1994

***PRACTICE & PROCEDURE****: Distress - Relationship between plaintiff and defendant under the agreement - Whether landlord and tenant or licensee.*

The plaintiff is the owner of a sports complex and swimming complex. On 24 April 1987, the plaintiff entered into two management agreements with the defendant to manage the running of the sports complex and swimming pool complex for a period of two years with effect from 15 January 1987 until 14 January 1989. The defendant was allowed to collect entrance fees from members of the public utilising the said complexes. The agreements required the defendant to pay a certain sum of money per month to the plaintiff. These agreements also imposed a lot of conditions on the defendant. The stamp duty for these agreements were not paid on the basis of a tenancy agreement.

After the expiry of the two year period, the defendants continued to manage the running of the two complexes. They however failed to pay the plaintiff the monies due. As at October 1992 the defendant owed the plaintiff RM385,200 on the basis of an alleged rental of RM21,100 per month for the sports complex and RM12,000 per month for the swimming pool complex. By an *exparte* application the plaintiff obtained a distress order against the defendant for the said amount. The defendant applied to set aside the distress order on the grounds that there was never a landlord tenant relationship between the plaintiff and defendant and therefore the monthly payment was not rental.

**Held:**
The agreements merely appointed the defendant to manage the plaintiff's sports and swimming pool complexes on behalf of the plaintiff. As a manager, they were responsible to the plaintiff for the running of the complexes. And they were paid for the services that they rendered. They were merely a licensee. Nothing more than that. True it is that they had to make monthly payments to the plaintiff. But these payments were not rentals. They were required to pay monthly to the plaintiff simply because they were authorised to collect the entrance fees and treat such collection as their revenue. The entrance fees would have been the revenue of the plaintiffs if the complexes had not been privatised. The defendant would not have agreed to undertake the privatisation of the complexes if the revenue derived from the collection of entrance fees had not been lucrative. Although not expressly stated, the agreements provided a system of revenue sharing.

*[Application allowed]*

**Cases referred to:**
*Kuppa v. Brown & Anor [1960] 26 MLJ Hill Ag. CJ p. 60* ***(refd)***
*Woo Yew Chee v. Yong Yong Hoo [1979] 1 MLJ 131* ***(foll)***

**Legislation referred to:**
Local Government Act, 1976
Distress Act 1951, ss 2, 5
Rules of the High Court 1980, O. 75
Stamp Act 1949, s. 4, First Schedule, Item 49(a)(ii)

*For the applicant/defendant - Philip Choong; M/s. Philip Chong & Co.*
*For the respondent/plaintiff - Alex Charles; M/s. Nur Ashikin Alex & Rakan Rakan*

**JUDGMENT**

**Mohd Hishamudin bin Mohd. Yunus J:**
This is an application by the defendant by summons in chambers (encl. 10) for an order in terms of the following prayers:

1. That the order for the issuance of a warrant of distress dated 17 November 1992, the warrant of distress dated 17 November 1992 and notice of seizure be set aside;

2. That the damages for illegal distress to be assessed by the Senior Assistant Registrar of the Honourable Court.

The plaintiff is the local authority (as defined under the Local Government Act, 1976) with the responsibility for the administration of the municipality of Petaling Jaya, while the defendant is a private limited company. The plaintiff owns a sports complex and swimming complex. Both complexes are situate in Taman Tasek Subang, Petaling Jaya, and are meant for the use and enjoyment of the members of the public, in particular the residents of Petaling Jaya. The facilities available at the sports complex are ten squash courts, four badminton courts and eight tennis courts, while the swimming pool complex provides two olympic size swimming pools and a children's wading pool.

The plaintiff was desirous of privatising the management of these complexes. So, on 24 April 1987 the plaintiff entered into two management agreements with the defendant. In the first agreement, the plaintiff appointed the defendant to manage the running of the sports complex for a period of two years with effect from 15 January 1987 until 14 January 1989. As payment for the management service rendered by the defendant to the plaintiff, the agreement authorised the defendant to collect and keep as their revenue the entrance fees (the rate to be determined by the plaintiff) paid by the members of the public using the sports complex. But the agreement also required the defendant to pay the plaintiff a sum of RM20,100 per month.

In the second management agreement, the plaintiff appointed the defendant company to manage the running of the swimming complex, also with effect from 15 January 1987 until 14 January 1989. For the service rendered, the agreement authorised the defendant to collect and keep as their revenue the entrance fees paid by the members of the public using the swimming pool complex, but at the same time the defendant was also required to pay the plaintiff RM12,000 per month.

However, after 14 January 1989 (that is, after the expiry of the two-year period) the defendant continued to manage the running of the two complexes. What the actual arrangements were as between the plaintiff and the defendant for the period beyond this date is a matter of dispute. From the plaintiff's standpoint, they allowed the defendant to continue managing the complexes but only on the basis of a monthly tenancy. The defendant, on the other hand maintains that the plaintiff had agreed to extend the agreement for another three years,

and thereafter subject to renewal every three years up to a maximum period of twelve years. But it is common ground that the details of the arrangements had yet to be worked out and the formal agreements had yet to be executed between the parties as regards the extension; and that negotiations had been going on between the parties as to the terms of the agreements to be entered into.

Be that as it may, by a letter dated 21 September 1991 the plaintiff through their solicitors gave the defendant one month notice to quit and deliver vacant possession of the sports complex and swimming pool complex on or before 1 November 1991 failing which eviction proceedings would be instituted against the defendant, and the plaintiff would claim mesne profits in the sum of RM24,000 for the sports complex and RM40,000 for the swimming pool complex from 1 November 1991 till delivery of vacant possession of the premises in good order and condition to the plaintiff. The reasons given for the said notice were that the agreements of 24 April 1987 had lapsed, that negotiations regarding the extension did not achieve any agreement, and that as at 15 September 1991 the defendant had defaulted in their monthly payments in the sum of RM24,000 for the swimming pool complex and RM40,200 for the sports complex.

On 17 November 1992, the plaintiff by an *ex parte* application obtained a distress order against the defendant for alleged arrears in rental for 12 months from November 1991 till October 1992, the total sum due being RM385,200 on the basis of an alleged rental of RM21,100 per month for the sports complex and RM12,000 per month for the swimming pool complex.

In the present application, the learned Counsel for the plaintiff contends that the agreements created a tenancy and a landlord-tenant relationship as between the parties, and therefore the Distress Act 1951 is applicable. The defendant, on the other hand, contends that the plaintiff has no legal basis and is wrong in law in filing the application for a warrant of distress against the defendant under O. 75 of the Rules of the High Court 1980 and the Distress Act, 1951. It is argued that the alleged sum of RM385,200 as set out in the writ of distress did not arise out of arrears of rental in respect of premises let out by the plaintiff to the defendant in the manner provided under the Distress Act, 1951; that the sports complex and the swimming pool complex were not occupied by the defendant as a tenant under a tenancy agreement as defined under the Distress Act 1951; and that at all material times the defendant had possession, management and the control of the sports and the swimming pool complexes as a licensee and manager under the management agreements.

On 18 January 1993 after hearing the summons in chambers (encl. 10) in chambers, I allowed the application in terms of the prayers. The plaintiff,dissatisfied with the decision, applied for further arguments in open Court. After hearing further arguments (submitted by way of written submissions) I confirmed the order made in chambers on 9 September 1994.

I now give my reasons.

The issue that I have addressed myself to is this: in law, was the relationship between the plaintiff and the defendant under the two management agreements that of a landlord and tenant and therefore the monthly payments paid by the defendant to the plaintiff were rentals? The determination of this issue is crucial for the disposal of the present application. For, only if the agreements created an agreement of tenancy between the plaintiff and the defendant could the former apply for a warrant of distress under the Distress Act 1951. Section 5 of the Act stipulates:

5. **Application for warrant of distress.**

(1) A landlord or his agent duly authorized in writing may apply *ex parte* to a Judge or Registrar for an order for the issue of a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly.

Section 2 of the Act defines "landlord" and "tenant" as follows:

"landlord" means the lessor or sub-lessor of any premises, under any lease, sub-lease, or agreement of tenancy, and includes any person claiming to be entitled in any capacity to receive rents due under any such lease or agreement.

"tenant" means any person from whom a landlord claims rent to be under any lease, sublease or agreement.

On the principles, in *Kuppa v. Brown & Anor* [1960] 26 MLJ Hill Ag. CJ at p. 60 stated:

The learned Trial Judge stated, and I respectfully agree, that the authorities make it abundantly clear that the question whether the person is a tenant or a licensee is a question depending upon the intention of the parties and the law does not impute intention to enter into legal relationships when the circumstances and the conduct of the parties negative any such intention.

In *Woo Yew Chee v. Yong Yong Hoo* [1979] 1 MLJ 131 there was an elaboration of the principles. In this subsequent case, Raja Azlan Shah Ag. CJ; (as he then was) said (at p. 133):

I now turn to the crux of the matter; Was the transaction a licence or a tenancy? What is the test to be applied? It is now well known that the law will always look beyond terminology of the agreement to the actual facts of the situation (see *Addiscombe Garden Estates Ltd. v. Crabbe* [1958] 1 QB 513). The reason is because of the sham agreements purporting to create no more than mere licences which are designed to circumvent the protective provisions of the Control of Rent Act. It is no longer a question of words but of substances. It is no longer a question of whether the occupation is permanent or temporary. All these are factors which may be relevant in arriving at a decision whether a particular transaction is a licence or tenancy but none of them is conclusive. The ultimate test is the nature and quality of the occupancy; whether it is intended that the occupier should have a stake in the premises sublet or whether he should have only a personal privilege. Mohamed Azmi J applied this test in *Chin See Lian v. Ng Wan Pit* [1973] 1 MLJ 115. That seems to be the correct principle and it is entirely in accordance with the view taken by Lord Denning M.R. in *Marchant v. Charters* [1977] 3 All ER 918,922:

It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these arc factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and the quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?

On the test of exclusive possession, the learned Judge held:

In any event exclusive possession is no longer a decisive test. That is an old law which is now gone. The nature and quality of the occupancy must be looked at with a view to determine its true character. In *Somma v. Hazelhurst* [1978] NLJ 463 the Court considered the terms of the agreement before it and concluded that whether or not an arrangement constitutes tenancy or licence is no longer a matter of exclusive possession, or even any of the traditional indicators of tenancy, but simply that of the intention of the parties.

In the present case, in examining the nature and quality of the defendant's occupancy of the premises, in order to determine whether the parties intended the arrangement to be a tenancy or a mere licence, I do not propose to examine both the agreements. As the contents of both the agreements are rather similar, I feel it would suffice for me to examine only one of the agreements: the sports complex agreement. Any findings that I may make in respect of the sports complex agreement would equally apply to the swimming pool complex agreement.

For the purpose of such examination, I consider the following provisions of the agreement to be relevant:

1. **Appointment**

1.1. MPPJ hereby appoints the manager to manage the said sports complex on terms and conditions as hereinafter contained. It is hereby understood and agreed that the manager is not an employee or agent of MPPJ and the manager's employees and agents or any other persons shall have no claims whatsoever against MPPJ for any act or omission of the manager throughout the duration of this agreement.

2. **Date of Commencement & Duration**

2.1. This agreement shall be for a duration of two years commencing from 15 January 1987 and ending on 14 January 1989.

3. **Earlier Termination**

3.1. MPPJ shall be entitled to terminate this agreement by giving two (2) months written notice to the manager in any of the following events:

(a) that the manager has committed a breach of any of the terms and conditions of this agreement;

(b) that the manager has failed to manage the said sports complex in a manner which is satisfactory to MPPJ provided always that MPPJ shall have given written notice to the manager stating the faults that the manager has committed and after giving the manager reasonable time to rectify the faults, the manager has failed to rectify the same.

4. **Management**

4.1. The manager shall be responsible for the total running of the said sports complex ensuring always that the rights of the public to the usage of the said sports complex as provided in cl. 6.1 & 6.2 shall not be in anyway diminished, discriminated against, prejudiced or deprived in any manner whatsoever.

4.2. Without prejudice to the generality of cl. 4.1 above, the manager's responsibilities in the management of the said sports complex shall also include the following:

(a) to provide its own manpower;

(b) to provide its own finance;

(c) to provide maintenance and repair for the tennis, squash and badminton courts and replacement of equipment and plants of the said sports complex at its own expense;

(d) to provide guard and security;

(e) to ensure that the orders, instructions, rules and regulations as laid down by MPPJ in respect of the usage and proper maintenance of the said sports complex are strictly followed.

5. **Revenue and Payment**

5.1. The manager is authorised to collect the entrance fees to the said sports complex as shall be fixed by MPPJ.

5.2. The manager shall pay MPPJ a sum of Malaysian Ringgit Twenty Thousand One Hundred (RM20,100) only per month with effect from 15 February 1987 (One month free payment from 15 January 1987 to 14 February 1987). Subsequent monthly payment shall be made on or before the 14th day of the month. Without prejudice to the rights of MPPJ under cl. 5.4., an interest at the rate of eighteen percent (18%) per annum is chargeable by MPPJ against the manager for any monthly payment received after the 14th day of the month.

5.3. The manager shall, in addition to the monthly payment, pay to MPPJ a deposit in the sum of Malaysian Ringgit Forty Thousand Two Hundred (RM40,200) only or gives a bank guarantee in favour of MPPJ on or before the signing of this agreement. This deposit shall be refundable to the manager six (6) months after this agreement has expired or earlier terminated whichever is applicable free of interest less such sums as may then be due to MPPJ but without prejudice to any other claims which MPPJ may have against the manager under the terms of this agreement.

5.4. MPPJ shall have the right to terminate this agreement in the event the manager fails to pay MPPJ as stipulated in cl. 5.2.

6. **Sports Complex**

6.1.(1) The said sports complex shall be open to the public at the time as shall be stated in appendix II attached to this agreement. The entrance fees for adults and children shall be charged in accordance with appendix II attached hereto in this agreement.

6.1.(2) Notwithstanding the provision of cl. 6.1(1) above, the manager shall allow MPPJ at all times the free use of four (4) of the eight (8) tennis courts facilities available at the said sports complex.

6.1.(3) It is hereby understood by the parties hereto that any additional facilities provided by MPPJ at the said sports complex to be managed by the manager shall be at a fee to be discussed and agreed by the parties hereto.

6.2. The manager shall not increase the entrance fees for any member of the public to the said sports complex except with the prior written approval and authority of MPPJ.

6.3. MPPJ shall have the right to the exclusive use of the said sports complex for a period of time. However, MPPJ shall give sufficient notice to the manager of such intention. Agreement for a reduction of the monthly fee shall be agreed upon between MPPJ and the Manager arising from the exclusive use of the said sports complex by MPPJ.

6.4. The manager shall be responsible for the entire administration of all matters related to the running of the said sports complex. The main responsibilities of the manager related to the administration of the said sports complex are as mentioned in appendix III attached hereto. However the list is not exhaustive. Other relevant responsibilities of the manager shall be at the discretion and further direction of MPPJ, which may be issued from time to time, for the mutual benefit of both parties so that the said sports complex is maintained at a high standard of cleanliness and fit for public sports complex.

6.5. All payments in respect of water and electricity bills as well as payments of water and electricity deposits and other service charges shall be borne and paid by the manager throughout the duration of this agreement.

6.6. The manager shall comply with all laws, rules and regulations concerning business and building administration as may be required by any Acts, Enactments or By Laws. Any act of the manager which is contrary to such laws, rules and regulations shall be regarded as an act of breach of this agreement.

6.7. The manager hereby agrees and undertakes to employ disciplined and qualified staff for the management of the said sports complex. A list of the employees or additional employees employed by the manager shall be furnished by the manager to MPPJ. The list shall be updated by the manager from time to time.

6.8. It is hereby understood and agreed by the parties hereto that all the employees taken for the administration of the said sports complex are the employees of the manager and not the employees of MPPJ. The manager shall be responsible for the welfare of its employees which includes payment of their salaries, contribution of EPF and SOCSO and workmen compensation policy.

6.9. (1) The manager shall allow free and uninterrupted access at reasonable times to any authorised officer of MPPJ to the said sports complex for the purpose of inspecting that the terms and conditions of this agreement are adhered to.

6.9. (2) The manager shall also allow and permit any authorised office of MPPJ to evict any undesirable person who fails to abide by the rules and orders of MPPJ as to the usage of the said sports complex.

6.9.(3) The manager shall be responsible to see that the users of the said sports complex abide by the rules and standing orders of MPPJ as to the usage of the said sports complex at all times and to take necessary steps to evict any user who violates the said rules and standing orders.

6.9.(4) The manager shall also be responsible for the maintenance of the open grounds and plants/trees in the area of the said sports complex.

6.9.(5) The manager shall be allowed to levy a fee for the usage of the parking facilities in the said sports complex provided always that the manager shall obtain the prior written consent of MPPJ and subject to any conditions imposed thereon.

Apart from these provisions, it is also brought to my notice by the submissions that the stamp duty for the agreement was not paid on the basis of a tenancy agreement.

Having scrutinised and evaluated the above provisions and considering the stamp duty paid, and applying the principles, I am satisfied from the nature and quality of the transactions that the parties intended the defendant's occupation of the premises to have the character of a mere licence only, and not that of a tenancy. To my mind, the following factors are pertinent. First, there is the absence of such words as "landlord", "tenant", "lease" "tenancy" or "rental" in the agreement. Instead, the word "fee" is used to describe the monthly payment made by the defendant to the plaintiff (cl. 6.3).

Secondly, there is the status of the defendant to consider. They were appointed merely as a manager to run the management of the sports complex on behalf of the plaintiff. They were rendering a service for the plaintiff for which they were paid by the plaintiff who authorised them to collect and keep the entrance fees as their (defendant's) revenue.

Thirdly, in managing the sports complex, in view of the fact that the defendant was managing, it on behalf of the plaintiff, they were subjected to extensive control by the plaintiff. For example, the defendant was not at liberty to fix the rates of fees; nor were they given the discretion to determine the opening hours. Even the extent of the responsibilities of the defendant (as manager) was not confined to those already listed in Appendix III of the Agreement they may be increased at the discretion of the plaintiff.

Fourthly, the defendant did not enjoy exclusive possession of the premises. They were required to open the sports complex to the public and the rules governing the use of the

complex by the public were determined by the plaintiff. The defendant was also required to allow MPPJ at all times the free use of four tennis courts. In addition to this, MPPJ had the right to the exclusive use of the sports complex for such period of time as they desired, subject to the giving of sufficient notice to the defendant.

Fifthly, the agreements, as noted, were not stamped as tenancy agreements. The stamp duty paid for each agreement was only a nominal sum of RM10. Had the agreements been stamped as tenancy agreements, then the amount payable as stamp duty would have been RM1,929 for the sports complex agreement and RM1,152 for the swimming pool complex agreement (see s. 4 and item 49(a) (ii) of the First Schedule of the Stamp Act 1949).

In my judgment, the agreements merely appointed the defendant to manage the plaintiff's sports and swimming pool complexes on behalf of the plaintiff. As a manager, they were responsible to the plaintiff for the running of the complexes. And they were paid for the services that they rendered. They were merely a licensee. Nothing more than that. True it is that they had to make monthly payments to the plaintiff. But I do not consider these payments as rentals. They were required to pay monthly to the plaintiff simply because they were authorised to collect the entrance fees and treat such collection as their revenue. The entrance fees would have been the revenue of the plaintiff if the complexes had not been privatised. The defendant would not have agreed to undertake the privatisation of the complexes if the revenue derived from the collection of entrance fees had not been lucrative. I would say that, although not expressly stated, the agreements provided a system of revenue sharing.